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No. 91-1183

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

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RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,
*Petitioner,*
v.
THE UNITED STATES OF AMERICA;
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY;
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITIONER'S REPLY BRIEF

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In opposition to the petition for a writ of certiorari in this case, the United States advances three arguments. First, it argues that RF&P was on notice from the "plain terms" of the 1938 Indenture that Area 3 is restricted to railroad use only and that the National Park Service merely reasserted this restriction in 1990. U.S. Br. 8-12. Second, it argues that Petitioner errs in contending that the decision below conflicts with decisions of courts of appeals in three other circuits. *Id.* at 12-15. Third, it argues that RF&P's "factbound contention" that it was denied "additional discovery" does not "warrant review by this Court." *Id.* at 15.

In this reply, Petitioner responds to each of these arguments.

## I.

The Government's principal argument—that Petitioner was put on notice in 1938 by the "plain terms" of the Indenture—ignores black-letter law. The terms of an agreement must be construed with reference to the applicable law at the time it was entered into. As the Court recently stated:

> A contract depends on a regime of common and statutory law for its effectiveness and enforcement.
>
> > "Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge."

*Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. ——, 111 S. Ct. 1156, 1164 (1991), *quoting Farmers and Merchants Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va.*, 262 U.S. 649, 660 (1923) (Brandeis, J.).

The law applicable to the 1938 Indenture, as discussed in the Petition, Pet. 14-18, establishes that a "railroad purposes only" restriction on the use of real property does not impose a perpetual limitation and does not preclude other use of the property. The court of appeals disregarded this law, ruling instead, without citation, that the restriction was expressed as a covenant that runs with the land and "[c]ovenants that run with the land are not temporary unless they provide for conditions of termination or expiration." Pet. App. 8a. Not surprisingly, the United States makes no effort to defend this ruling, which is contrary to basic tenets of real property law.

"Plain language" does not control the construction of a restriction on the use of real property. If it did, this Court could not have held in *Texas & P. Ry. v. City of Marshall*, 136 U.S. 393, 403 (1890), that a requirement for "permanent establishment" of a railroad's terminus and facilities is satisfied by maintaining them for eight years. Similarly, the Virginia Supreme Court could not have held that a deed requiring that a 100-foot wide strip of land "be forever kept open and unobstructed as a public highway, and for no other purpose whatsoever," was satisfied by using only half of it for a highway and selling the rest for use as a railroad line. *Alexandria & Washington R.R. Co. v. Chew*, 68 Va. (27 Gratt.) 547 (1876). These rulings and the doctrines they enunciate are grounded in the general disfavor of restrictions on the use and alienability of real property.

Just as the United States ignores the property law applicable to the 1938 Indenture, it mischaracterizes the claim the National Park Service actually made in 1990. Like the courts below, the Government erroneously contends that the Park Service was simply reasserting the restriction in the 1938 Indenture.

In fact, the Park Service asserted a different property interest, and it did so in order to cloud RF&P's title to Area 3. The Park Service claimed in a letter to the General Services Administration, a potential tenant of an office development on Area 3, that it "owns restrictive easements . . . which are intended to protect the [George Washington] parkway [and] only allow the property to be used for railroad purposes." The Park Service also asserted that it had the right to control development on Area 3 by virtue of the 1938 Indenture. Pet. 5.

Nowhere does the 1938 Indenture create a "restrictive easement" owned by the United States in Area 3. Nowhere does the 1938 Indenture state that the provisions concerning Area 3 are intended to benefit the George

Washington Parkway or its predecessor, the Mount Vernon Memorial Highway. And nowhere does the 1938 Indenture suggest that the Park Service has any control over development of Area 3.

The property interests in Area 3 that the Park Service claimed in 1990 are hardly the "same restriction" as that stated in the 1938 Indenture. Pet. App. 8a-9a. The difference is apparent in the 1938 Indenture itself, which did create "easements" elsewhere to protect the Mount Vernon Memorial Highway. Most notably, the United States quitclaimed Area 6, 10.4 acres just to the east of Area 3, to RF&P "for railroad purposes and subject to . . . easements," as well as restrictions and covenants. 1938 Indenture, C.A. Joint App. 55. These gave the United States the right to enter and plant trees, shrubs, and other plants on Area 6 "for the protection of the view or outlook over said tracks" from land then occupied by the Mount Vernon Memorial Highway and prohibited construction of any building, structure, or sign visible from the Highway without prior written consent from the Director of the National Park Service. *Id.* at 58-59.[1]

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[1] RF&P granted the United States similar "easements, rights and servitudes . . . for the effective screening of [its] works . . . from view from the Mt. Vernon Memorial Highway" in adjacent areas on the north and south shore of the cove of Four Mile Run, whose fee ownership by RF&P was not in dispute. 1938 Indenture, C.A. Joint App. 41. Fee title to these areas, as well as Area 6 and a portion of Area 3, were condemned by the United States in 1939 for relocation of the Highway in conjunction with the construction of Washington National Airport.

The Government's planting easements were closely related to the covenant RF&P entered into concerning Area 3. The covenant provided not only that RF&P would not use Area 3 "for any other purpose than the construction, maintenance and operation by it of its main line railroad tracks and ways and a freight yard in connection therewith," but also that RF&P would "begin the construction of any filling in . . . Area 3 only at the eastern edge of said area" and "in order to permit the planting by [the United

The provisions concerning Area 3 contained no such easements or rights in the United States. The 1990 claim by the Park Service went well beyond even the "plain language" of the 1938 Indenture. It is incorrect to contend, as the United States does, that no new or different claim was made in 1990.

## II.

The Fourth Circuit ruled that the limitations bar of the Quiet Title Act applies even if RF&P did not know the exact nature of the Government's claim in 1938 "for all that is necessary for accrual is 'a reasonable awareness that the Government claims *some interest* adverse to the plaintiff's.'" Pet. App. 9a (emphasis supplied by the Fourth Circuit). Petitioner contends that this ruling conflicts with decisions of courts of appeals in three other circuits. Pet. 9-14. The Government's effort to distinguish these cases is unpersuasive.

Contrary to the Government's argument, the Third Circuit case of *Deakyne v. Department of Army Corps of Eng'rs*, 701 F.2d 271 (3d Cir.), *cert. denied*, 464 U.S. 818 (1983), cannot be distinguished on the ground that there the Government was claiming a different interest than it had previously asserted. *See* U.S. Br. 11. If "some interest" were sufficient, as the court below held in this case, the quiet title action in *Deakyne* would have been time-barred because the plaintiff was on notice of the Government's earlier, lesser claim. And, as discussed

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States] on Area 6" would not fill the remainder until the eastern fill and the planting were completed. *Id.* at 51.

Contrary to the Government's description, U.S. Br. 5, more than "an intervening strip of land" separated Area 3 from the Mount Vernon Memorial Highway at the time of the Indenture. Not only was Area 6 between Area 3 and the Highway, but an additional 10.7 acres to its west, quitclaimed by RF&P to the United States in the 1938 Indenture, further separated Area 3 from the Highway. The "intervening strip" contained more than 21 acres and was nearly one thousand feet wide at its northern end. *Id.* at 23.

above, the 1990 claim by the National Park Service that precipitated this quiet title action was not "exactly the interest" granted by the "clear language" of the 1938 Indenture. *Id.* at 13.

The Government's attempt to distinguish the Tenth Circuit case of *Poverty Flats Land & Cattle Co. v. United States*, 706 F.2d 1078 (10th Cir. 1983), is even less convincing. U.S. Br. 13. The Government seeks to contrast the situation in *Poverty Flats*, where "legal authorities rais[ed] a question" about the meaning of a mineral rights reservation in a conveyance instrument, with the situation in this case, where, according to the Government, "any ambiguity . . . is inherent in the 1938 Indenture itself." U.S. Br. 13. This purported distinction defies comprehension. In this quiet title action, as in *Poverty Flats*, the issue is the legal meaning of a provision in an instrument concerning a property interest of the United States. The Tenth Circuit held that the age of the instrument does not bar the action; the Fourth Circuit in this case held the opposite. There is a clear conflict between the decisions.

Finally, the Government seeks to distinguish the Ninth Circuit case of *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989), because it did not involve a claim by the United States that was "unequivocally spelled out in a document." U.S. Br. 15. This surely provides no basis for reconciling the ruling below with the Ninth Circuit's statement in *Shultz* that "[t]he statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred." 886 F.2d at 1161. The Government's further argument that the statement in *Shultz* is dictum, U.S. Br. 15 n.12, is not supported by a reading of the case. Far from dictum, the court's statement was an integral part of its holding and directions to the lower

court. Like *Deakyne* and *Poverty Flats*, *Shultz* conflicts with the decision below.

## III.

The United States contends that the lower courts were correct in denying RF&P discovery because RF&P does not specify what discovery was needed, there was no genuine issue of material fact, and RF&P was clearly aware of the terms of the 1938 Indenture that the Park Service is now asserting. U.S. Br. 15-16.

The Government's argument misses Petitioner's point. RF&P was not denied "additional discovery," as the Government states. *Id.* at 15. It was denied *any* discovery and *any* opportunity for an evidentiary proceeding. The United States filed its motion to dismiss in lieu of an answer to the complaint. Although the court of appeals asserted that "[t]he merits of a quiet title claim are irrelevant to the operation of the limitations bar," Pet. App. 7a, it is evident that its decision purported to construe the terms of the 1938 Indenture involving Area 3—the issue that is central to the merits of the action.

In these circumstances, where the jurisdictional issue is intertwined with the merits, the plaintiff should be permitted to proceed with reasonable discovery and permitted to present evidence. See cases cited in Pet. 20-21. Indeed, one of the justifications the United States gives for denying discovery—a position RF&P espoused in a 1978 state property tax case, U.S. Br. 16-17—itself suggests the impropriety of disposition of this case on a bare motion to dismiss. The United States similarly raised a new evidentiary point on appeal in *Deakyne*. The Third Circuit quite properly held that it should be addressed in the first instance by the district court on remand. 701 F.2d at 274-75. Appropriate disposition of this case requires that factual issues be addressed under normal summary judgment procedures, including the provision of "adequate time for discovery" for the party opposing

dismissal. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## IV.

As its brief in opposition makes clear, the ultimate position of the United States in this case is that the statute of limitations should bar this quiet title action whether the restriction in the 1938 Indenture has the legal meaning it contends or not. The Government argues, for example, that even "[i]f the duration and scope of the Indenture's restrictions were unclear under law that was 'known to the parties to the 1938 Indenture' (Pet. 15), petitioner was on notice of that uncertainty in 1938, and can assert no justification for sleeping on its asserted rights until August 1990." U.S. Br. 9-10.

Thus, the Government contends that after twelve years a written instrument creating a real property interest in the United States means whatever the Government says, at least if the newly asserted meaning finds some support in the text of the instrument. Indeed, the Government suggests that "the federal interest" is inconsistent with "ephemeral" use restrictions, *id.* at 10 n.8, and "state property doctrines," *id.* at 9.

A strict construction of a limited waiver of sovereign immunity does not justify this unprincipled result. The controversy in this case is current, not stale. Judicial resolution through a quiet title action should not be barred merely because it involves construction of a property interest created in 1938.

## CONCLUSION

For these reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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